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No. 99-1908

IN THE
Supreme Court of the United States

JAMES ALEXANDER, in his official capacity as the Director of the Alabama Department of Public Safety, and the ALABAMA DEPARTMENT OF PUBLIC SAFETY,
Petitioners,

v.

MARTHA SANDOVAL, individually and on behalf of all others similarly situated,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether Congress intended to create a private right of action on behalf of individuals claiming to have been injured by a State's violation of federal administrative regulations, issued pursuant to Section 602 of the Civil Rights Act of 1964, that purport to incorporate a disparate impact standard into Title VI's anti-discrimination provisions.

Fairly encompassed within that question is the following subsidiary question:

Whether the U.S. Departments of Justice and Transportation exceeded the authority granted to them under Section 602 of the Civil Rights Act of 1964, when they adopted regulations that purport to incorporate a disparate impact standard into Title VI's anti-discrimination provisions.

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INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a Washington, D.C.-based nonprofit public interest law firm with supporters in all 50 states, including Alabama.[1] WLF devotes a significant portion of its resources to promoting economic liberty, free enterprise principles, and a limited and accountable government. To that end, WLF has appeared before this and other federal courts in an effort to prevent unwarranted judicial expansion of federal civil rights laws. In particular, WLF has opposed attempts to incorporate "disparate impact" principles into cases decided under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.* *See, e.g., Seif v. Chester Residents Concerned for Quality Living*, No. 97-1620, *cert. dismissed*, 524 U.S. 974 (1998); *Powell v. Ridge*, 187 F.3d 387 (3d Cir.), *cert. denied*, 120 S. Ct. 579 (1999).

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici are troubled by the broad scope of the decision below; they are concerned that it could result in judicial challenge to a broad range of facially neutral programs and policies administered by State actors and by private entities that receive federal funding. Indeed, numerous such challenges are pending.

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[1] Pursuant to S. Ct. R. 37.6, WLF hereby affirms that no counsel for either party authored any part of this brief, and that no person or entity, other than WLF, its supporters, and its counsel, made a monetary contribution to the preparation or submission of this brief.

Amici agree with Petitioners that the appeals court erred when it held that Congress intended to create a private right of action under regulations implementing Title VI of the Civil Rights Act of 1964 on behalf of individuals allegedly injured by policies that have a disparate impact on the basis of race, color, or national origin. No such right of action is set forth in the statute, and -- applying traditional rules of statutory construction -- there is no basis for inferring congressional intent to create such a right of action.

Amici write separately in order to emphasize an additional ground for concluding that Congress did not intend to create a private right of action to enforce Title VI disparate impact regulations. In adopting Title VI (which proscribes intentional discrimination only), Congress never intended to permit federal agencies to promulgate Title VI regulations incorporating a disparate impact standard. Because the regulations purporting to adopt such a standard were not authorized by Congress, it could not have intended to create a private right of action on behalf of those alleging injury as a result of violation of those regulations.

Amici are filing this brief with the consent of all parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

In the interests of brevity, *amici* hereby adopt by reference the Statement of the Case contained in the Petition.

In brief, Petitioner Alabama Department of Public Safety (the "Department") is charged with licensing motor vehicle drivers within Alabama. In 1991, the Department

adopted a policy requiring all portions of the driver's license examination process to be administered in English.

Respondent Martha Sandoval filed suit against the policy in 1996, alleging that Alabama's English-only policy had a disparate impact on the foreign-born, who (Ms. Sandoval alleged) are more likely than U.S.-born residents to be unable to comprehend English. Ms. Sandoval alleged that the policy violated federal regulations designed to implement the anti-discrimination provisions of Title VI of the Civil Rights Act of 1964 ("Title VI"), 42 U.S.C. § 2000d, *et seq*.[2]

Following a February 1998 trial, the district court granted the Department's motion for judgment as a matter of law on Ms. Sandoval's intentional discrimination claims. Pet. App. 64a. Ms. Sandoval has not appealed from that ruling. On June 3, 1998, the district court issued its opinion

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[2] Section 601 of Title VI, 42 U.S.C. § 2000d, provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Section 602, 42 U.S.C. § 2000d-1, authorizes federal agencies that provide financial assistance to issue "rules, regulations, or orders of general applicability" in order to "effectuate the provisions of section 601." The Title VI regulations invoked by Ms. Sandoval in support of her claim are 49 C.F.R. § 21.5(b)(2) (Department of Transportation) and 28 C.F.R. § 42.104(b)(2) (Department of Justice), which require recipients of federal funds to not "directly, or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting [individuals] to discrimination on the basis of their race, color, or national origin." *See* Petition Appendix ("Pet. App.") 5a n2.

rendering judgment for Ms. Sandoval, based on a disparate impact standard. Pet. App. 58a-254a. The court found: (1) the federal regulations adopting a disparate impact standard were valid (*id.* at 74a n.11); (2) the Department was a recipient of federal funds within the meaning of Title VI (*id.* at 76a-82a); (3) Congress impliedly created a direct cause of action on behalf of those discriminated against in violation of the Title VI regulations (*id.* at 82a-117a); (4) Ms. Sandoval had standing (*id.* at 117a-125a); (5) the Eleventh Amendment did not bar Ms. Sandoval's claims for injunctive relief (*id.* at 125a-149a); (6) Alabama's English-only policy had a disparate impact on those born outside the United States (*id.* at 149a-205a); and (7) Alabama did not meet its burden of demonstrating that the English-only policy had a "substantial legitimate justification" (*id.* at 205a-246a). The court enjoined enforcement of the English-only policy and ordered the parties to meet in an effort to agree on a new policy. *Id.* at 252a-254a.

The Eleventh Circuit affirmed. *Id.* at 1a-57a. The appeals court upheld the validity the Department of Transportation and Department of Justice Title VI regulations imposing a disparate impact standard, stating that this Court held in *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983), that federal agencies "have the authority to promulgate regulations under Section 602 that prohibit federal funding recipients from taking any action that *results* in a disparate impact or produces discriminatory *effects* on the basis of race, color, or national origin." Pet. App. 35a-36a (emphasis in original).[3]

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[3] The appeals court stated that the Department "concede[d] that these agency implementing regulations are valid exercises of agency authority (continued...)

The appeals court also found that Congress impliedly created a private right of action to enforce the disparate impact regulations. *Id.* at 34a-48a.[4] The court based that finding primarily on its reading of this Court's opinions in *Guardians* and *Alexander v. Choate*, 469 U.S. 287 (1985).

Finally, the appeals court affirmed the trial court findings that the English-only rule had a disparate impact on foreign-borns and that the Department had failed to provide adequate justification for the rule. Pet. App. 48a-56a. Accordingly, the appeals court affirmed the trial court's grant of injunctive relief.

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[3](...continued)
under Section 2000d-1." *Id.* at 5a n.2. That statement is incorrect; the Department made no such concession. The Department's Eleventh Circuit brief merely recited what the various *Guardians* opinions said regarding the validity of the disparate impact regulations (Brief at 28), and then noted that later Supreme Court case law "rejected an attempt by private plaintiffs to assert a disparate impact claim under Title VI regulations." 11th Circuit Brief at 29 (citing *United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992)). Furthermore, the appeals court recognized later in its opinion that the Department was, indeed, challenging the regulations, stating, "Appellants argue that the Supreme Court in *United States v. Fordice* overruled *Guardians*. . ." Pet App. 47a n.24.

[4] The appeals court did not consider whether 42 U.S.C. § 1983 created an *express* right of action to enforce the Title VI disparate impact regulations against State actors. The court stated that Ms. Sandoval had chosen not to assert a right of action under § 1983 but rather to rely solely "on Section 602 directly." *Id.* at 45a n.21. In the absence of assertion of a § 1983 claim, Ms. Sandoval's cause of action must rise or fall on the existence of an implied right of action under § 602 to enforce the disparate impact regulations. Any plaintiff asserting a right of action under § 1983 would need to overcome significant hurdles. *See Middlesex County Sewerage Auth. v. National Sea Clammers Assn*, 453 U.S. 1 (1981).

The Department's certiorari petition presents a single issue for review: whether Congress intended to create a private right of action on behalf of individuals claiming to have been injured by a State's violation of federal Title VI regulations that purport to incorporate a disparate impact standard into Title VI's anti-discrimination provisions. Fairly encompassed within that issue is the validity of those regulations -- because there can be no basis for inferring a congressional intent to create a private right of action to enforce disparate impact regulations if Congress never intended to permit such regulations.

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning whether a federal agency may validly promulgate a regulation that incorporates a disparate impact standard under Title VI of the Civil Rights Act, when the statutory and constitutional authority under which the agency acts reaches only cases of intentional discrimination. This Court has never squarely addressed that question, although it has made statements in several decisions that have led lower courts, such as the Eleventh Circuit below, to surmise erroneously that a federal agency may do so.

In particular, the Eleventh Circuit and numerous other lower federal courts have wrongly interpreted this Court's decisions in *Guardians* and *Alexander* as holding that agency regulations under Title VI that incorporate a disparate impact standard are valid. So pervasive is the error that at least eight other federal courts of appeal have assumed (based on *Guardians*) that the validity of such agency regulations is not an open question, even though this Court has never squarely addressed the issue. Most recently, in

United States v. Fordice, 505 U.S. 717, 732 n.7 (1992), the Court indicated that agency regulations under Title VI did *not* extend beyond the protection provided by the Fourteenth Amendment, but the Eleventh Circuit ignored *Fordice*'s admonition under the mistaken belief that the Court had settled the issue in *Guardians* and *Alexander*.

At the very least, *Fordice* made clear that the validity of the Title VI disparate impact regulations is an open question in this Court, yet the federal appeals courts have failed to grasp that fact. Review is warranted in order to correct the appeals courts' widespread misinterpretation of *Guardians* and to decide, once and for all, the validity of the Title VI disparate impact regulations.

As outlined below, the Title VI disparate impact regulations are being invoked with increasing frequency in the last several years, in a wide number of contexts. That development lends urgency to the need for resolution of the important issues of federal law raised in this case.

Amici fully support the Department's contention that, even if the disparate impact regulations are valid, Congress did not intend to create a private right of action to enforce those regulations. But more fundamentally, because federal agencies may not issue Title VI regulations incorporating a disparate impact test, the Eleventh Circuit erred in finding a private right of action to enforce such regulations.[5]

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[5] The fundamental question of whether the disparate impact regulations are valid is therefore a "subsidiary question fairly included" within the question presented by Petitioners. SUP. CT. R. 14.1(a). Alternatively, WLF submits that this presents a question of law that is a

(continued...)

I. THE DECISION BELOW WAS BASED ON THE ERRONEOUS ASSUMPTION THAT *GUARDIANS* DETERMINED THAT CONGRESS AUTHORIZED FEDERAL AGENCIES TO INCORPORATE A DISPARATE IMPACT STANDARD INTO TITLE VI REGULATIONS

The Department is subject to Title VI by virtue of its receipt of funding from the U.S. Department of Transportation (DOT). Consideration of whether DOT could validly incorporate a disparate impact standard into its Title VI regulations must begin with the Constitution and Title VI itself. The Court has held that the Equal Protection Clause prohibits only instances of intentional discrimination and does not address conduct that has a disparate impact on protected groups but is not intentionally discriminatory. *Washington v. Davis,* 426 U.S. 229 (1976). The Court has also held that Title VI extends no farther than the Equal Protection Clause and thus that a Title VI claim cannot be established based solely on disparate impact evidence. *Fordice,* 505 U.S. at 732 n.7; *Regents v. Bakke,* 438 U.S. 281, 284-87 (1978) (Powell, J., concurring in the judgment); *id.* at 328 (Brennan, White, Marshall, and Blackmun, JJ, concurring in the judgment in part and dissenting in part). Indeed, the Eleventh Circuit acknowledged that Ms. Sandoval's failure to demonstrate discriminatory intent in this case precluded a cause of action under either Title VI or the Equal Protection Clause. Pet. App. 34a.

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[5](...continued)
"predicate to an intelligent resolution" of the question on which this Court would grant certiorari. *Vance v. Terrazas*, 444 U.S. 252, 258-59 n.5 (1980).

Having properly acknowledged the limited scope of protection provided by the Constitution and Title VI, the Eleventh Circuit then embarked on a misguided analytical detour, based on a misreading of this Court's decisions. The appeals court stated that this Court's decisions in *Guardians* and *Alexander* held that a federal agency's issuance of disparate impact regulations is a valid exercise of its authority under Section 602, 42 U.S.C. § 2000d-1. Pet. App. 35a-37a. However, properly read, neither of those decisions encompasses such a broad and erroneous holding.

Guardians involved an allegation that a last-hired/ first-fired policy for lay-offs of police officers had a disparate impact on black and Hispanic police officers because officers were hired in order of their examination scores, and members of those racial groups on average scored lower on the examinations. The Second Circuit denied the plaintiffs' damages claim under Title VI on the ground that a Title VI cause of action requires proof of discriminatory intent.

A fractured Supreme Court affirmed, but without producing a majority opinion. Seven Justices agreed that no Title VI cause of action could be established in the absence of evidence of intentional discrimination. *Guardians,* 463 U.S. at 610 (Powell, J., concurring in the judgment, joined by Burger, C.J., and Rehnquist, J.); *id.* at 612 (O'Connor, J., concurring in the judgment); *id.* at 642 (Stevens, J., dissenting, joined by Brennan and Blackmun, JJ.). However, the Court was far less united in its views regarding the Title VI disparate impact regulations. Four Justices who voted to affirm the Second Circuit stated that administrative agencies could not validly incorporate a disparate impact standard into Title VI regulations once it

had been determined that Title VI itself did not incorporate such a standard. *Id.* at 611 (Powell, J., concurring in the judgment, joined by Burger, C.J., and Rehnquist, J.); *id.* at 613 (O'Connor, J., concurring in the judgment). The four dissenting Justices stated that the disparate impact regulations were valid. *Id.* at 623 (Marshall, J., dissenting); *id.* at 645 (Stevens, J., dissenting, joined by Brennan and Blackmun, JJ.). Justice White stated that the Second Circuit should be affirmed on the ground that monetary relief is unavailable in an action brought pursuant to the Title VI regulations where there is no allegation of intentional discrimination. *Id.* at 593-98 (White, J., concurring in the judgment). Justice White also stated in *dictum* that the Title VI disparate impact regulations were valid, but that *dictum* played no part in the disposition of the case. *Id.* at 589-93.

Because five Justices in *Guardians* (the four dissenters plus Justice White) stated that the Title VI disparate impact regulations were valid, the Eleventh Circuit concluded that *Guardians* "held" that those regulations were valid. But as the Court emphasized once again just this past term, "This is simply not the way that reasoned constitutional adjudication proceeds." *United States v. Morrison,* 120 S. Ct. 1740, 1757 (2000). One cannot glean the Court's "holding" in a case by adding together the views of concurring and dissenting Justices, even when the sum is five or greater. Rather, "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds." *Nichols v. United States*, 511 U.S. 738, 745 (1994) (quoting from *Marks v. United States,* 430 U.S. 188, 193 (1977)). Thus, in *Morrison* the Court rejected the argument that a view joined

in by three concurring Justices and three dissenting Justices constituted a "holding" of the Court in *United States v. Guest,* 383 U.S. 745 (1966). *Morrison,* 120 S. Ct. at 1757.

Accordingly, the only "holding" in *Guardians* is the narrowest grounds agreed to among the five Justices who voted to affirm the Second Circuit's decision -- namely, that without evidence of discriminatory intent, there can be no cause of action for damages based on violation of Title VI or its implementing regulations. The Eleventh Circuit's finding that *Guardians* had upheld the Title VI disparate impact regulations was based on its erroneous belief that a "holding" can be discerned by adding together the views of concurring and dissenting Justices.

The appeals court also claimed that the Court upheld the Title VI disparate impact regulations in *Alexander.* Pet. App. 36a, 38a. That claim is a misreading of *Alexander*, which had nothing to do with Title VI but rather involved the Rehabilitation Act of 1973 (the "Act"), a law loosely patterned after Title VI. The plaintiffs in that case were Medicaid recipients who sought declaratory and injunctive relief from a State's reduction in the number of inpatient hospital days that the State's Medicaid program would pay on behalf of the recipients. *Alexander,* 469 U.S. at 289. The plaintiffs alleged that the State's reduction had a disparate impact on the handicapped and thus violated the Act and its implementing regulations. The unanimous and limited holding of the Court was that the plaintiffs' allegations were not cognizable under the Rehabilitation Act or its implementing regulations. *Id.* at 309. The Court's opinion includes a brief discussion of *Guardians* (*id.* at 292-94) and Title VI, but that discussion is clearly *dicta* given that *Alexander* did not involve a Title VI claim and given

that the holding in the case was that the plaintiffs did *not* state a claim under the Act or its implementing regulations.

Any suggestion that the Court has already upheld the Title VI disparate impact regulations was laid to rest by *Fordice*, a suit (brought by private plaintiffs and the United States) alleging that Mississippi had not done enough to eradicate the lingering effects of past segregation in its higher education system. In response to the private plaintiffs' claims that Title VI and its implementing regulations required Mississippi to do more to eradicate those effects, the Court stated:

> Private petitioners reiterate in this Court their assertion that the state system also violates Title VI, *citing a regulation* to that statute which requires States to "take affirmative action to overcome the effects of prior discrimination." *Our cases make clear, and the parties do not disagree, that the reach of Title VI's protection extends no further than the Fourteenth Amendment.* We thus treat the issues in these cases as they are implicated under the Constitution.

Id. at 732, n.7 (emphasis added) (citations omitted).

The appeals court noted this passage but rejected the Department's argument that the passage called into doubt the validity of the Title VI regulations, stating, "Nor are we persuaded that the Supreme Court would have overruled *Guardians* without *any* discussion of its precedent and in so oblique a manner as suggested by Appellants." Pet. App. 48a n.24. But the appeals court's rationale for brushing off *Fordice* proceeds from a faulty premise: *Guardians* did *not* hold that the regulations were valid, and thus there would

have been no need for *Fordice* to "overrule" *Guardians* in order to question their validity.

Because the Court has never directly ruled on the validity of Title VI disparate impact regulations, an important issue of federal law that arises repeatedly in the lower federal courts, *amici* urge the Court to grant the Petition in order to decide that issue once and for all.

II. BECAUSE CONGRESS DID NOT ADOPT A DISPARATE IMPACT STANDARD FOR TITLE VI SUITS, IT CANNOT BE DEEMED TO HAVE AUTHORIZED AGENCIES TO ADOPT THAT STANDARD IN THEIR IMPLEMENTING REGULATIONS

The Court should grant the Petition for the additional reason that the appeals court's decision is inconsistent with this Court's interpretation of Title VI.

Both Respondent and the Eleventh Circuit concede that a Title VI cause of action requires proof of discriminatory intent. Pet. App. 34a. Section 602, 42 U.S.C. § 2000d-1, authorizes federal agencies disbursing federal funds to issue "rules, regulations, or orders of general applicability" in order "to effectuate the [anti-discrimination] provisions" of § 601. Given that § 601 does *not* incorporate a disparate impact standard, it is difficult to discern how regulations incorporating such a standard could be said to "effectuate" the provisions of § 601.

As Justice O'Connor explained in *Guardians*:

> Such regulations do not simply "further" the purpose of Title VI; they go well *beyond* that purpose. . . . Although the Court has stated that an agency's legislative regulations will be upheld if they are "reasonably related" to the purposes of the enabling statute, . . . we would expand considerably the discretion and power of agencies were we to interpret "reasonably related" to permit agencies to proscribe conduct that Congress did not intend to prohibit. "Reasonably related to" simply cannot mean "inconsistent with."

Guardians, 463 U.S. at 613-15 (O'Connor, J., concurring in the judgment) (citation omitted).

This is not a case where room for agency discretion in defining the scope of prohibited conduct was necessary because it was impractical for Congress to enact specific limitations. Within constitutional limits, Congress could have determined that the dangers of discrimination warranted extending Title VI protections beyond instances of intentional discrimination. That it did not do so must be regarded by this Court as a deliberate policy choice, and not as a deferral to administrative agencies to make the decision instead. The difference between prohibiting discriminatory intent and disparate impact represents precisely the type of broad public policy decision that rests in the hands of our elected legislatures, and not administrative agencies. Under these circumstances, DOT's decision to incorporate a disparate impact standard into its Title VI regulations is not entitled to deference. *See Guardians*, 463 U.S. at 611 n.5 (Powell, J., concurring in the judgment) ("I do not question the view that the Court should sustain a reasonable administrative interpretation even if we would have reached a different result had the question initially arisen in a

judicial proceeding. . . . But I know of no precedent whatever for asserting that this deference to administrative interpretation is proper *after* this Court already has issued a definitive -- and contrary -- construction of its own.") (citation omitted).

The Court should grant the Petition in order to correct the Eleventh Circuit's error in interpreting Title VI, an error that has been repeated by numerous courts of appeals.

III. REVIEW IS WARRANTED DUE TO THE SIGNIFICANT INCREASE IN TITLE VI DISPARATE IMPACT PROCEEDINGS

Ms. Sandoval's disparate impact challenge to Alabama's driver's license procedures is not an isolated example of use of Title VI disparate impact regulations to challenge practices heretofore thought by many to be largely unobjectionable.[6] To the contrary, creative litigants have begun to rely on the regulations to challenge a broad range of longstanding government practices. Although the regulations have been on the books for several decades, it is only in the past few years that lawyers have begun to focus on them as a potent litigating weapon. This recent sharp rise in proceedings under the Title VI regulations provides an additional reason why review is warranted.

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[6] English-only rules are widespread and, until recently, have drawn little objection. With a few isolated exceptions (*e.g.*, public education and criminal court proceedings), neither the federal government nor States have previously felt obliged to address residents in a language other than English. As the Department points out, for example, the Seventh Circuit has upheld the federal Immigration and Naturalization Service's decision not to print its forms and notices in Russian for the benefit of those of born in Russia. *Nazarova v. INS*, 171 F.3d 478 (7th Cir. 1999).

For example, the federal Environmental Protection Agency recently issued its "Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits," published at 65 Fed. Reg. 39,650 (June 27, 2000). This EPA guidance document extends the Title VI disparate impact concept to applications for EPA permits. Under EPA's new view of its Title VI regulations, citizens may file a federal suit to block the grant of an EPA permit to an industrial facility located in their community by demonstrating that other communities, with lesser concentrations of members of the plaintiffs' particular racial group, are host to fewer sources of industrial pollution. Evidence of discriminatory intent would be unnecessary. Indeed, the Title VI regulations case in which the court granted certiorari in 1998 was just such an "environmental justice" suit. *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925 (3d Cir. 1997), *cert. granted*, 524 U.S. 915, *vacated as moot*, 524 U.S. 974 (1998).

The U.S. Department of Education recently issued a draft guidance document elaborating on its Title VI regulations. The guidance document is a thinly veiled threat of enforcement action against colleges that fail to decrease their reliance on standardized tests (such as the SAT and the ACT) in the admissions process because those tests have been shown to have a disparate impact on certain racial minority groups. *See* U.S. Department of Education, Office for Civil Rights, "The Use of Tests When Making High-Stakes Decisions for Students: A Resource Guide for Educators and Policymakers" (July 6, 2000).

Title VI disparate impact lawsuits abound in the area of education, as those adversely affected by education selection criteria have sought in recent years to invoke the Title VI regulations to challenge those criteria. *See, e.g., Cureton v. National Collegiate Athletic Ass'n*, 198 F.3d 107 (3d Cir. 1999) (NCAA academic criteria for freshman participation in intercollegiate athletics alleged to have disparate impact on African-Americans); *Ass'n of Mexican-American Educators v. California*, No. 96-17131 (9th Cir. 1999), rehearing en banc granted (9th Cir. 2000) (Title VI disparate impact challenge to use of CBEST test in California teacher certification decisions); *White v. Engler* (E.D. Mich., filed June 27, 2000) (Title VI disparate impact challenge to use of MEAP test scores to award state college scholarships). Such suits are troubling in light of their potential to undermine academic freedom. The Court traditionally has been wary of causes of action that require courts to second-guess the academic decisions of professional educators. *See, e.g., Bd. of Regents v. Southworth*, 120 S. Ct. 1346 (2000).

The recent rise in efforts to expand and enforce the Title VI disparate impact regulations may in large part be attributable to a July 14, 1994 memorandum from Attorney General Janet Reno to all "heads of departments and agencies that provide federal financial assistance," instructing them to "ensure that the disparate impact provisions in your [Title VI] regulations are fully utilized." *See generally*, R. Clegg, *The Bad Law of Disparate Impact*, THE PUBLIC INTEREST 79 (Jan. 1, 2000). Whatever the cause, the increased enforcement activity makes it just that much more important for the Court to determine once and for all whether Congress intended to permit federal agencies to incorporate a disparate impact standard into their Title VI regulations.

IV. RECOGNITION OF A PRIVATE RIGHT OF ACTION TO ENFORCE TITLE VI REGULATIONS IS INCONSISTENT WITH THE STATUTORY LANGUAGE

As demonstrated above, Congress did not authorize federal agencies to issue Title VI regulations incorporating a disparate impact standard, and thus it could not have intended to create a private right of action to enforce such regulations. But even if the disparate impact regulations are valid, *amici* fully support the Department's contention that recognition of a private right of action to enforce those regulations is inconsistent with the language of Title VI. The Eleventh Circuit's disregard of that language provides an additional reason to grant review in this case.

Section 602 contains the statutory language authorizing federal agencies to issue regulations in order "to effectuate" the anti-discrimination provisions of § 601. Section 602 goes on to spell out the manner in which any such regulations may be enforced:

> Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, . . . or (2) by any other means authorized by law. *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.

42 U.S.C. § 2000d-1.

Congress could not have been more plain that compliance with any regulations issued pursuant to § 602 may be enforced in only one of two ways, neither of which includes a private right of action by those alleging injury as a result of violation of the regulations. An implied private right of action cannot fairly be termed "other means authorized by law" in the absence of specific law authorizing the right of action. Even if one accepted the argument that an implied private right of action can fairly be included within the phrase "other means authorized by law," Ms. Sandoval's cause of action cannot be sustained because she has not met the prerequisites for suit set forth in § 602: advice to the Department from DOT that the Department is not in compliance with DOT regulations, and DOT's inability to secure compliance by voluntary means. *See Cannon v. University of Chicago,* 441 U.S. 677, 713 n.49 (1979).

In arriving at the opposite conclusion, the lower courts essentially ignored the language of § 602. Instead, they focused on legislative history and a desire to effectuate congressional purpose to combat discrimination. Pet. App. 94a-117a, 42a-48a. But this Court need look no farther than the language of § 602 to determine that there is no implied private right of action to enforce Title VI regulations issued pursuant to § 602. The question whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction. *Transamerica Mortgage Advisors, Inc. v. Lewis,* 444 U.S. 11, 15 (1979). Any effort to discern congressional intent "must begin with the language of the statute itself." *Id.* at 16. Once, as here, an examination of the statutory language makes plain that Congress did not intend to create a private right of action,

the Court's "inquiry is at an end," regardless whether (as Ms. Sandoval contends she is) the plaintiff is within the class intended to be protected by the regulations. *Id.* at 24.

The lower courts took the position that § 602's creation of express means of enforcing the § 602 regulations is not by itself evidence that Congress did not create other, implied means of enforcement. But that argument ignores the plain language of § 602, which states unequivocally that "no action shall be taken" to enforce the regulations until the prerequisites set forth in § 602 have been met. As the Court explained under similar circumstances in *Transamerica*:

> Yet it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it. When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.

Id. at 19-20 (citation omitted).

The Court should grant review in this case in order to correct the Eleventh Circuit's erroneous interpretation of § 602, an error that has been repeated by other appeals courts.

CONCLUSION

Amici curiae respectfully request that the Court grant the Petition.

Respectfully submitted,

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